IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 221

PHILCO CORPORATION, *Petitioner*,

v.

THE UNITED STATES, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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MISCELLANEOUS

U. S. Supreme Court Rule 19 11

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PHILCO CORPORATION, *Petitioner,*

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THE UNITED STATES, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner, Philco Corporation, a corporation organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, prays that a writ of certiorari issue to review the judgment of the United States Court of Claims, entered in the above-entitled case on April 17, 1959.

CITATIONS TO OPINIONS OR DECISION BELOW

There was no opinion rendered by the court below. The single order of the Court of Claims granting the respondent's motion for judgment on the pleadings in

this case, and in two other cases involving different factual situations (R. 87 and Appendix A hereto, *infra*, p. 1a), is unreported.

JURISDICTION

This Court has jurisdiction under 28 U.S.C., Section 1255(1).

QUESTIONS PRESENTED

The Court of Claims summarily granted respondent's motion for judgment on the pleadings thus admitting the allegations of the petitioner. The petitioner had alleged that by rebates or allowances it had readjusted its prices on certain articles which proved to be defective during a warranty period. The allegations were expressed in the exact terms of the statute which permits excise tax refunds where a price is so readjusted.

The questions are therefore:

1. If, admittedly, a price is readjusted by reason of a rebate or allowance is it a "price . . . readjusted by reason of . . . a rebate or allowance" under the statute, when the readjustment is to satisfy the purchaser of a defective article?

2. Has the Court of Claims by a negative answer to question 1 deprived the petitioner of property without due process?

STATUTE INVOLVED

The statutory provision involved is Section 3443 (a)(2) of the Internal Revenue Code of 1939, (26 U.S.C. § 3443(a)(2) (1952)), originally enacted as Section 621 of the Revenue Act of 1932, 47 Stat. 169, which reads:

"SEC. 3443. CREDITS AND REFUNDS.

"(a) A credit against tax under this chapter, or a refund, may be allowed or made—

* * * * *

"(2) to any person who has paid tax under this chapter with respect to an article, when the price on which the tax was based is readjusted by reason of return or repossession of the article or a covering or container, or by a bona fide discount, rebate, or allowance; in the amount of that part of the tax proportionate to the part of the price which is refunded or credited.

* * * * *"

STATEMENT

After disallowance of claims for refund by the Commissioner of Internal Revenue, the petitioner, on February 29, 1956, filed a petition in the Court of Claims for recovery of excessive tax payments. An amended petition was filed on March 16, 1956. The suit was based upon Sections 3443(a)(2) and 3443(b) of the Internal Revenue Code of 1939, the relevant portions of which provide:

> "A credit against tax . . . or a refund, may be allowed . . . to any person who has paid tax under this chapter with respect to an article, when the price on which the tax was based is readjusted by reason of . . . a bona fide . . . allowance . . ."

To show that it came within the terms of the statute, the petitioner alleged that "by payment to its vendees or by giving them credits" (R. 2, ¶5, R. 4, ¶11) it expended amounts which "constituted bona fide discounts, rebates or allowances within the meaning of Section 3443(a)(2) of the Internal Revenue Code of 1939." (R. 3, ¶7, R. 4, ¶13).

The respondent denied these critical allegations in its answer filed April 30, 1956. (R. 14, ¶¶5, 7, R. 15, ¶¶11, 13).

On November 13, 1958, the respondent filed a motion for judgment on the pleadings and supporting brief,

> "on the grounds that the pleadings fail to state a claim upon which relief can be granted in view of the Court's decisions in *General Motors Corp., Frigidaire Div.* v. *United States*, 147 F. Supp. 739 and 163 F. Supp. 854, decided respectively on January 16, 1957 and July 16, 1958, certiorari denied October 20, 1958, and *Ford Motor Co.* v. *United States*, 156 F. Supp. 554, certiorari denied, October 20, 1958 . . . ." (R. 21-22).

In opposing the respondent's motion on January 14, 1959 (R. 29-72), the petitioner pointed out that the court's decisions in *General Motors Corp., Frigidaire Div.* v. *United States*[1] and *Ford Motor Co.* v. *United States*[2] were based upon a determination that those manufacturers had incurred expense for "correcting defects" and that their purchasers did not get back any part of the purchase price. (R. 41).[3] This petitioner, however, did not repair defective articles and did, in fact, return a part of the purchase price to the vendees. The petitioner also filed an affidavit (R. 57-

[1] 147 F. Supp. 739 (1957), 163 F. Supp. 854, (1958), *certiorari denied*, 358 U.S. 866 (1958), referred to hereinafter as *General Motors*.

[2] 156 F. Supp. 554, (1957), *certiorari denied*, 358 U.S. 864 (1958), referred to hereinafter as *Ford*.

[3] For similar reasons, petitioner does not rely upon the decision of the Court of Claims in General Motors Corp., Frigidaire Div. v. United States, 128 Ct. Cl. 465, 121 F. Supp. 932 (1954), *certiorari denied*, 348 U.S. 942 (1955), which also involved the expenses of repair rather than price allowances to vendees.

62) setting forth the character of the evidence it would present to substantiate its allegations and prove that it had made "bona fide discounts, rebates or allowances" within the terms of the statute. (R. 58-59).

In a reply brief (R. 73-86) the respondent continued to deny the specific facts upon which the petitioner was relying. Although the petition and the affidavit clearly stated that it was the petitioner's practice to return a part of the purchase price of an article to its vendees in the event the article was defective, the respondent claimed that the petitioner "did not refund or credit any part of the prices for which the products were sold by it." (R. 82).

After oral argument, the Court of Claims on April 17, 1959, issued its order granting the motion for judgment on the pleadings, basing it upon the decisions of the court in the *General Motors* and *Ford* cases. (R. 87)[1]

REASONS FOR GRANTING THE WRIT

I.

In Refusing to Hear Proof That Petitioner Is Entitled to Recover Under the Statute the Court Has Arbitrarily and Summarily Denied the Petitioner Due Process of Law

The statutory provision involved is a re-enactment of Section 621 of the Revenue Act of 1932. The plain language of the statute is to allow "any person" to recover a pro rata share of taxes paid on the sale of an article "when the price on which the tax is based is readjusted . . . by a bona fide discount, rebate, or allowance." The Congressional purpose is reasonable

[1] The order, as shown in App. A, p. 1a, *infra*, disposed not only of the petitioner's case, but two other cases involving materially different allegations and facts.

and logical. Since the tax involved is based upon the actual price received for an article, Congress has provided for a reduction in the tax previously paid on the sales price of an article when that price is subsequently reduced. The legislative history pertaining to the Revenue Act of 1932 indicates beyond question that the Congress intended the broadly phrased statutory provision here involved to operate liberally, inclusively, and without discrimination.[5]

The Court of Claims, however, has, in effect, created a conclusive presumption that a person cannot recover under the statute where a price adjustment is made because a purchased article has proved defective and therefore worth less than the original sales price. This concern for the motive underlying the price adjustment is unwarranted since the statute plainly includes all price adjustments effected by a bona fide discount, rebate or allowance regardless of motive. The establishment of a class of persons to whom recovery under the statute must be automatically denied is therefore an arbitrary action on the part of the court. It prevents a person from proving that he is entitled to relief. It is so obviously a denial of due process that it would seem to require little comment.

The precise rationale of the court's order is impossible to determine from the record since an opinion was not rendered in this case. For its authority, the order merely cited the court's prior *General Motors* and *Ford* decisions. Petitioner's allegations and proffer of proof, however, clearly showed that its facts differed materially from those found to exist in the *General Motors* and *Ford* cases. In those two cases

[5] This detailed legislative history, conclusively evidencing intent, is shown in Appendix B hereto, *infra*, pp. 1a-4a.

the Court of Claims had found as a fact that no portion of the price had been returned to the vendees by the claimants, but that the claimants retained the full price and repaired any defects.

> "In each case [General Motors and Ford] the expenditure by the manufacturer was for *correcting* a defect. It was not a readjustment of the sales price.
>
> * * * * *
>
> ". . . the . . . [purchaser] got no more than he had paid for, to wit, a sound article; he certainly did not get back any part of the purchase price." (Emphasis supplied)[8]

The petitioner, on the other hand, alleged and proffered proof that it does in fact return a part of the price to its vendee in case an article proves to be defective. It specifically contended that it did not repair the defective article. Contrary to the situation in the *General Motors* and *Ford* cases, the price ultimately received by the petitioner for defective articles was less than the price received for sound articles.

In view of the reliance of the court below on the *General Motors* and *Ford* decisions the issue here is whether there is *any* similarity between those cases and the instant case. The *single* factual similarity is that each of these cases involved defective articles. In refusing the petitioner the right to prove its allegations on the basis of those prior decisions, the Court of Claims has determined that this single similarity prevents recovery. There can be no other inference from the order.

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[8] Ford Motor Company v. United States, *supra*, 156 F. Supp. 554, 555 (1957).

The Court of Claims has therefore contravened the explicit words of the statute, and its legislative history, by conclusively presuming that a price is not readjusted where refunds readjusting the price were made because of defects in the articles sold.

This irrebutable presumption has become a substitute for proof that the petitioner gave bona fide discounts, rebates, or allowances under the terms of the statute. "This court has held more than once that a statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause. . . ."[7] Certainly the court cannot do that which the legislature is prohibited from doing, for "a constitutional prohibition cannot be transgressed indirectly by the creation of a . . . presumption any more than it can be violated by direct enactment".[8]

It is apparent that the Congress did not intend to provide for tax recoveries in the event of all price adjustments *except* those where defective articles are involved. To construe the statute in such a manner "is to disregard the plain language and the plain intent of the act. For . . . [a] court to do so would be to enact a law under the pretense of construing one, and thus pronounce itself guilty of a flagrant perversion of the judicial power."[9]

The *Heiner* v. *Donnan* case, and the cases therein cited and discussed, have established beyond question that in tax as well as other matters the right to present evidence in support of allegations essential to a proper

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[7] Heiner v. Donnan, 285 U.S. 312, 329, 52 S. Ct. 358, 362 (1932); and see Schlesinger v. Wisconsin, 270 U.S. 230, 46 S. Ct. 260 (1926).

[8] *Ibid.*

[9] *Id.*, at 331; 52 S. Ct. at 363.

decision is a constitutional right. As such, it cannot be destroyed either by the legislature or the courts.

The effect of the order of the court is to levy the excise tax on monies received, but not retained. "Such an exaction is not taxation but spoliation."[10] It results in discrimination which is so arbitrary and capricious as to amount to a denial of due process of law.

II.

The Impact of the Excise Tax Laws Upon the Nation's Entire Economy Demands That the Arbitrary Application Thereof by the Court of Claims be Reviewed by This Court

The type of excise tax question here involved has a widespread importance. Unlike the income tax, which can only serve to *deplete* the income interests of proprietors or stockholders, the excise tax can *destroy* all income and profits, and, indeed, capital assets. In any of the highly competitive industries essential to our economy—for example, the electronics industry—the payment of excessive excise taxes can impose a severe competitive handicap upon the manufacturer or importer. Price increases, detrimental to sales volume, often cannot absorb the excessive tax burden. In many instances the tax rate exceeds the gross margin of profit on the sale.

Since the tax burden is reflected in the price and since price is material to purchasers as well as sellers, excise tax questions are important to the wholesalers, dealers, and the general public. Faulty application of the excise tax laws, either by the administrative personnel or the courts, affects the entire economy of our country. The effect is two-fold: (1) Higher or lower

[10] Heimer v. Donnan, 285 U.S. 312 at 327.

prices; and (2) Increased or reduced sources of supply. These are direct effects, as compared to the indirect or consequential effects of most other taxes.

These direct effects on our economy demand that the excise tax laws be construed carefully and properly — not summarily. To this end, the Court should grant certiorari and review the instant case as one of material importance to the entire economy.

III.

The Departure From the Accepted and Usual Course of Judicial Proceedings Demands the Exercise of This Court's Supervisory Jurisdiction

This case presents a combination of features each of which calls for an exercise of this Court's power of supervision over the lower courts. This Court's responsibility for the proper functioning of the federal judiciary is particularly important with respect to the Court of Claims since its decisions are not subject to the ordinary appellate review.

Here the court has summarily granted judgment to the respondent despite the fact that the burden was on the respondent to demonstrate beyond doubt that no genuine issue of fact was present.[11] In a summary proceeding it is, of course, no part of the court's function to decide issues of fact, but only to determine whether there is an issue of fact to be tried.[12]

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[11] Heyward v. Public Housing Administration, 238 F. 2d 689, 696 (5th Cir. 1956); Hunter v. Mitchell, 180 F. 2d 763, 764, 86 U.S. App. D.C. 121, 122 (1950), and cases cited therein; Dewey v. Clark, 180 F. 2d 766, 772, 86 U.S. App. D.C. 137, 143 (1950).

[12] Byrnes v. Mutual Life Ins. Co. of N.Y., 217 F. 2d 497 (9th Cir. 1954), *certiorari denied* 348 U.S. 971 (1955).

As pointed out above, an issue of fact clearly was present in this case, namely whether the petitioner did readjust the price of certain articles by way of a bona fide rebate or allowance. In summarily refusing to permit the petitioner to prove this allegation of fact the Court of Claims has departed "from the accepted and usual course of judicial proceedings"[13] to such an extent that this Court's review is justified, if not, indeed, compelled.

The Court of Claims' action in this case is of special importance since it has denied the petitioner basic rights guaranteed by the Constitution. To allow such a result to remain unchallenged will leave on the books a modified statute which is "wholly arbitrary"[14] and contrary to the intent of Congress.

In effect, it makes recovery under Section 3443(a)(2) completely discretionary with the Court of Claims, dependent on whether the Court approves of the *reasons* for the price adjustment.[15] The *fact* that the price of an article has been adjusted becomes of no decisional importance. One might well wonder if the Court of Claims will approve *any* reason for a price adjustment. If this be so, it amounts to a virtual repeal of the statute and a usurpation of legislative power by the judiciary. If it is permitted to approve some reasons for price adjustments, but not others, as in this case, the result is arbitrary and discriminatory and even beyond the power of congress to enact.

[13] U.S. Sup. Ct. Rule 19.

[14] Schlesinger v. United States, 270 U.S. at 239.

[15] Of course, motive is immaterial in a price adjustment situation. See Helvering v. American Dental Co., 318 U.S. 322, 331, 63 S. Ct. 577, 582 (1943).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

105-56 PHILCO CORPORATION
168-56 CHRYSLER CORPORATION
216-56 WHIRLPOOL-SEEGER CORPORATION

v.

THE UNITED STATES

Order

These cases come before the court on defendant's motions for judgment on the pleadings, together with plaintiffs' responses thereto and the oral argument of counsel. Upon consideration thereof, and upon the basis of the decisions by this court in *General Motors Corp.* v. *United States*, No. 55-56, decided January 16, 1957 and July 16, 1958, and *Ford Motor Co.* v. *United States*, No. 231-56, decided December 4, 1957; certiorari denied in both cases on October 20, 1958,

IT IS ORDERED this seventeenth day of April, 1959, that defendant's motions for judgment on the pleadings be and the same are granted, and plaintiffs' petitions are dismissed.

BY THE COURT

MARVIN JONES
Chief Judge

APPENDIX B

The Legislative History

Prior to 1932 there had been a series of excise tax statutes, the first of which, for the present purposes, was the War Revenue Act of 1917. This and successor acts prior to 1932 laid the basis for regulations concerning the "price" on which the tax was to be computed.

These earlier regulations evolved into a multitude of rules for determining the taxed sales price. When the Congress was considering, at length, the adoption in 1932 of the first broad excise tax law it considered in detail the regulations on the tax price, and related matters, adopted under the earlier acts, and undertook to supersede such regulations by legislation.

When enacted, the Revenue Act of 1932 expressly reversed the regulatory inclusion of the tax itself within the taxed price unless the charge for the tax was separately stated on the invoice.[a] It virtually reversed the regulatory rule on the inclusion of transportation charges within the taxed price.[b] It materially modified the regulatory rule on the taxation of conditional sales.[c] It materially modified the regulatory rule on the taxation of consignment sales and the price to be taxed.[d] It generally reversed the regu-

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[a] The pre-1932 regulations (Article 3, Regulations 47, 1918 Revenue Act (TD 2832) and subsequent regulations) provided that the amount of the tax should be included in the taxed price unless the charge for the tax was separately stated on the invoice. The Act of 1932 provided that "there shall be excluded [from the taxed price] the amount of tax imposed by this title, whether or not stated as a separate charge." (Sec. 619, Revenue Act of 1932.)

[b] The pre-1932 regulations (Article 4, Regulations 47, 1926 Revenue Act and subsequent regulations) had provided, in effect, that freight charges are taxable as a part of the price unless the goods are sold and title passes at the factory, and freight charges are separately charged to the purchaser. The Act of 1932 provided that any transportation charge "shall be excluded from the price . . . if the amount thereof is established. . . ." (Sec. 619(a) of the Revenue Act of 1932.)

[c] The pre-1932 regulations (Article 9, Regulations 47, 1918 Revenue Act (TD 2832) and subsequent regulations) had provided, in effect, that the conditional sale of a taxable article was taxable when title passed or full payment was given, whichever was the earlier. The 1932 Act materially modified the rule, providing that "there shall be paid upon each payment" a proportional share of the total tax. (Sec. 619(c) of the Revenue Act of 1932.)

[d] The pre-1932 regulations (Article VI, Regulations 44, 1917 War Revenue Act (TD 2719) and subsequent regulations) had provided in effect that sales to retailers on consignment should be taxable at the time title passes to the retailer as shown by reports from the retailers. The 1932 Act provided that

latory rule disallowing tax recoveries in most cases involving discounts subsequent to the sale.[3]

Finally, and most significantly, it deleted the regulatory rule that permitted guaranty or warranty refunds to form the basis for a tax recovery only if the article was returned.[4] Instead it substituted the simple criterion that any price adjustment based upon a "bona fide discount, rebate, or allowance" will allow tax recovery.[5] The use of the term "allowance", a term that had not been used previously in the regulations or statutes, is clearly indicative of the Congressional intent to allow tax recoveries in *any bona fide* price adjustment situation.[6]

---

consignment sales shall be taxed on the basis of the "price for which such articles are sold in the ordinary course of trade, by manufacturers." (Sec. 619(b), Revenue Act of 1932.)

[3] The pre-1932 regulations (Article 4, Regulations 47, 1928 Act) provided in effect that discounts after the sale cannot be deducted from the taxed price, except in the case of originally agreed upon quantity rebates and rebates for goods not resold. The deductible rebates would result in an adjustment in the tax for the month in which the rebates were made. The 1932 Act provided for a credit to "any person . . . when the price on which the tax was based is readjusted . . . by a bona fide discount, rebate, or allowance; . . ." (Sec. 621, Revenue Act of 1932, the statute here involved.) It may be noted here that the liberal term "allowance", not used in the regulations, was adopted by the Congress—probably because the terms "discounts" and "rebates" had been used in a parallel and related manner throughout the regulations.

[4] The pre-1932 regulations (Article 5, Regulations 47, 1918 Revenue Act—Revised 1920 (TD 3132) and subsequent regulations) had provided, in effect, that price refunds because of a "guaranty" as to quality or service shall result in a pro rata tax credit *if the article is returned*. The 1932 Act struck the condition that the article must be returned, providing simply that a credit may be allowed to "any person . . . when the price on which the tax was based is readjusted . . . by a *bona fide* discount, rebate, or *allowance*; . . ." (Emphasis supplied.) (Sec. 621, Revenue Act of 1932, the statute here involved.)

[5] The terms "discount" and "rebate" were used in the pre-1932 regulations virtually synonymously in the treatment of trade, cash and quantity rebates made subsequently to the sale. The more general term "allowance" was apparently added to assure that the earlier usage of the regulatory terms should not in any way restrict the liberality intended.

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In the Supreme Court of the United States

October Term, 1950

PRINCE CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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General Motors Corp., Frigidaire Div. v. *United States*, 163 F. Supp. 854, certiorari denied, 358 U.S. 866 ..... 2, 3, 4, 6

Statute:

Internal Revenue Code of 1939, Sec. 3443(a) (26 U.S.C. 1952 ed., Sec. 3443(a)) 2, 5

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The Court of Claims wrote no opinion.

JURISDICTION

The order of the Court of Claims was entered on April 17, 1959. (Pet. 1a.) The petition for a writ of certiorari was filed on July 16, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTION PRESENTED

Whether the Court of Claims correctly dismissed the taxpayer's suit for refund of excise taxes on the authority of *Ford Motor Co.* v. *United States*, 156 F. Supp. 554 (C. Cls.), certiorari denied, 358 U.S. 864,

and *General Motors Corp., Frigidaire Div.* v. *United States*, 163 F. Supp. 854 (C. Cls.), certiorari denied, 358 U.S. 866.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 3443. CREDITS AND REFUNDS.

(a) A credit against tax under this chapter, or a refund, may be allowed or made—

* * * * *

(2) to any person who has paid tax under this chapter with respect to an article, when the price on which the tax was based is readjusted by reason of return or repossession of the article or a covering or container, or by a bona fide discount, rebate, or allowance; in the amount of that part of the tax proportionate to the part of the price which is refunded or credited.

* * * * *

[26 U.S.C. 1952 ed., 3443(a).]

STATEMENT

1. The taxpayer is a manufacturer of various appliances including television and radio receivers. (R. 2.) On February 29, 1956, the taxpayer filed a suit for refund of excise taxes in the Court of Claims, alleging that certain expenditures in the fulfillment of express warranties in connection with the taxable sale of its articles constituted bona fide discounts, rebates or allowances within the meaning of Section 3443(a)(2) of the Internal Revenue Code of 1939, *supra*. (R. 1–10.) The petition showed that, with its television sets and other products sold to dis-

tributors or dealers, the taxpayer issued a printed warranty running to the ultimate retail purchaser. The taxpayer thereby warranted the article "to be free from defects in material and workmanship" and agreed "to making good any part" which was returned to it within a stated period by the retail purchaser through the taxpayer's distributor or dealer and which, upon examination, the taxpayer was satisfied was defective. (R. 9.)

On November 13, 1958, the Government moved for a judgment on the pleadings on the authority of *General Motors Corp., Frigidaire Div.* v. *United States*, 163 F. Supp. 854 (C. Cls.), certiorari denied, 358 U.S. 866, and *Ford Motor Co.* v. *United States*, 156 F. Supp. 554 (C. Cls.), certiorari denied, 358 U.S. 864. (R. 17–27.) The taxpayer filed an opposition to this motion on the ground that its claim was essentially different from the *Ford* and *General Motors* cases. (R. 29–72.) The ground of distinction claimed by the taxpayer was that it did not repair or replace the defective part or reimburse its vendees (the dealers and distributors) for the actual cost of repairs or replacements, but instead simply gave the dealer or distributor a credit in a pre-determined amount for any defective part returned to it pursuant to the warranty. (R. 37.) In support of its opposition, the taxpayer submitted an affidavit of its controller, Barenther. The Barenther affidavit alleged that the taxpayer, by its agreements with its distributors, could satisfy its warranty obligation by giving the distributor a credit in a fixed amount equivalent to the value of the replacement part, and

the distributor and retail dealers assumed the burden of all labor costs incident to the replacement. The affidavit further alleged that upon receipt and inspection of a defective part covered by the warranty, the taxpayer gave its distributors a credit for the part without any inquiries as to what the dealer or distributor had done for the retail purchaser; that so far as the taxpayer was concerned, the dealer or distributor could have simply adjusted the retail price to the retail purchaser or replaced the defective part with a part of some other manufacturer. (R. 57–62.) On these facts, the taxpayer insisted that its fulfillment of the warranty by this method constituted a statutory "bona fide discount, rebate, or allowance" on the taxable sales price of the warranted articles to distributors, not a repair or replacement of the defective part. (R. 54.) The taxpayer also requested leave to introduce evidence to prove the facts so alleged. (R. 52.)

In its reply, the Government contended that, accepting the facts set forth in the Bareuther affidavit, the taxpayer was nevertheless simply fulfilling its obligations under the warranty by reimbursing its dealers and distributors for the cost of a defective part. (R. 73–86.) After argument on the motion (R. 86), the Court of Claims granted the Government's motion for judgment on the pleadings and dismissed the taxpayer's petition on the authority of the *Ford* and *General Motors* cases. (R. 87; Pet. 1a.)

ARGUMENT

1. The substantive question involved in this case is controlled by the *Ford* and *General Motors* decisions, and no other question requiring review by this Court is presented. *General Motors* established that the cost to a manufacturer of repair or replacement of parts of its products, warranted to be free from defects in material and workmanship, was not a price readjustment within the meaning of Section 3443(a)(2), entitling the taxpayer to a proportionate refund of the excise tax on the sales price of the product. *Ford* held that it made no difference whether the cost was borne directly, by the manufacturer making the repair or replacement itself, or indirectly, by the manufacturer reimbursing the dealer or distributor making the repair or replacement. The facts of the instant case are only a variation of the *Ford* facts: all the taxpayer here offered to prove was that it reimbursed its dealers and distributors in a pre-determined amount for any defective part returned to it, without further inquiry. Taxpayer's method of paying for the replacement of the defective part may have been simpler and more efficient than that involved in the *Ford* case—since it rendered unnecessary any detailed supervision of the relations between the retail purchaser and its dealers and distributors—but it was no different in substance. The return of a defective part was enough to invoke the taxpayer's obligation under the warranty; it was also enough to establish that, by crediting its dealer or distributor through whom the part was returned to it with the cost of the defective part, the taxpayer was simply bearing the cost of ful-

In discussing this provision, in its report, the House Ways and Means Committee left no doubt as to its meaning:

> "This last provision covers readjustments such as cash or quantity discounts, credits for return of goods or containers, *and any other bona fide rebate or allowance amounting to a change in the sale price.*" (Emphasis supplied.) (H.R. Rep. No. 708, 72d Cong., 1st Sess., p. 39 (1932))

filling its warranty to the retail purchaser and was not readjusting the price paid to it by the dealer or distributor. In short, the facts of the instant case present nothing that was not decided in *Ford* and *General Motors*.

2. Taxpayer's procedural arguments have no greater merit. The contention that the motion for judgment on the pleadings admitted the conclusory allegation of law that the credits were statutory price adjustments (Pet. 2) is elemental error. The claim of a denial of due process, on the ground that there was an issue of fact as to whether the taxpayer made a price adjustment or incurred a cost in fulfillment of its warranty, is equally unsound. The Government admitted, for purposes of the motion, all the facts alleged by the taxpayer in its petition and in the Barcuther affidavit, and the only question was that of law whether on those facts the credits could be characterized as "allowances" within the meaning of Section 3443(a)(2). The court properly held that they could not.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CHARLES K. RICE,
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AUGUST 1959.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 221

PHILCO CORPORATION, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Claims

REPLY BRIEF OF PETITIONER

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August 25, 1959

PERRY OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 221

PHILCO CORPORATION, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Claims

---

REPLY BRIEF OF PETITIONER

In its Brief in Opposition the Government does not contest the taxpayer's construction of the statute involved nor the widespread importance of the proper administration of the statute in the federal excise tax field. The Government admits, in effect, that the Petitioner has been denied due process if the credits made by the Petitioner to its purchasers can be character-

ized as "allowances" within the meaning of the statute involved.[1]

The Government argues that the Petitioner is controlled by the *General Motors*[2] and *Ford*[3] decisions because the Petitioner's facts are essentially similar to the facts in those cases. Thus, if there is a material distinction between the Petitioner's facts and the facts in the *Ford* and *General Motors* cases, it is apparent that the Government's entire argument fails, and it follows that Petitioner should be accorded a review of the Court of Claims' denial of due process.

Petitioner has consistently contended that its facts are not only dissimilar but are directly opposite to those in the *Ford* and *General Motors* cases in every material aspect. This petition for certiorari is not to seek a review of those decisions. In both the *General Motors* and *Ford* cases the Court of Claims found as a fact that no part of the purchase price paid to the manufacturer was returned to the purchaser of articles which proved to be defective. Instead, the Court found that these manufacturers either repaired the defective article or replaced the defective part. Since the manufacturers in those cases retained the full purchase price and the purchasers received exactly the article for which they bargained, the Court held that a price adjustment "by a bona fide discount, rebate, or allowance" had not occurred and hence Section

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[1] Internal Revenue Code of 1939, § 3443(a)(2), 53 STAT. 417.

[2] General Motors Corp., Frigidaire Div. v. United States, 147 F. Supp. 739 and 163 F. Supp. 854, *certiorari denied* 358 U.S. 864 (1958).

[3] Ford Motor Co. v. United States, 156 F. Supp., 554 (1957), *certiorari denied* 358 U.S. 864 (1958).

343(a)(2) was not applicable. This holding is in accord with the long-established rule that the rendering of additional services by the seller does not constitute a price adjustment regardless of the expense he incurs.[1] A price adjustment results only when a portion of the sales price flows back to the buyer.

The Petitioner did return a part of the sales price to the buyer and this material difference between its facts and the facts in the *Ford* and *General Motors* cases is plainly demonstrated in the Government's brief. On page 4, the Government states that the Petitioner has "alleged that upon receipt and inspection of a defective part covered by a warranty, *the taxpayer gave its distributors a credit for the part* without any inquiries as to what the dealer or distributor had done for the retail purchaser." (Emphasis added.) Later, in summarizing its contentions before the Court of Claims, the Brief in Opposition states (p. 4):

> "... accepting the facts set forth in the Barenther affidavit, the taxpayer was nevertheless simply fulfilling its obligations under the warranty *by reimbursing its dealers and distributors for the cost of a defective part.*" (Emphasis added.)

To claim that these facts are similar to those in *General Motors* and *Ford* strains credulity. In the *General Motors* and *Ford* cases, the manufacturer

[1] See Colony, Inc., 26 T.C. 30 (1956), *aff'd* 244 F. 2d 75 (6 Cir.), *reversed on other grounds*, 78 S. Ct. 1033 (1958); Country Club Estates, Inc., 22 T.C. 1283 (1954); Cambria Development Co., 34 B.T.A. 1155 (1936); Birdneck Realty Corporation, 25 B.T.A. 1084 (1932); Milton A. Mackey, 11 B.T.A. 569 (1928); Uvalde Co., 1 B.T.A. 932 (1925); Consolidated Asphalt Co., 1 B.T.A. 79 (1924).

made no discount, rebate or allowance on the taxable sales price, and the original price received by the manufacturer remained unadjusted and unchanged. In the present case, however, the Government brief recognizes that the Petitioner, "upon receipt and inspection of a defective part . . . *gave its distributors a credit for the part.*" It fulfilled its obligations under the warranty "*by reimbursing its dealers and distributors for the cost of a defective part.*" This reimbursement reduced the original purchase price to reflect the reduced value of the defective article. The Petitioner did not retain the original sales price and the purchaser did not receive the sound article for which he had bargained.

This basic distinction between the facts in this case and those in the *General Motors* and *Ford* cases has not only been recognized but has been relied upon by the Government in Revenue Rulings[3] and previous cases involving price adjustments under the statute. Each of these previous cases involved the repair of defective articles with no actual reduction in the purchase price. Here, where, for the first time, the facts show that a taxpayer has returned a portion of the price to his purchaser without making repairs or replacements, the Government, for the first time, denies the validity of the distinction.

The Government's present reliance on the *Ford* and *General Motors* cases to establish that such a distinction is immaterial or illusory is particularly surprising since in those very cases the Government strongly advocated the precise distinction it now disavows. In the

[3] Revenue Ruling 56-231, 1956-1 C.B. 686 (R. 43).

Ford case, the Department of Justice made the following point:

> "The 'part of the price which is refunded or credited' clearly contemplates a partial refund (i.e., a paying back to) or credit (i.e., an amount applied by the manufacturer to the credit of the article) to a purchaser, with a resulting reduction of the taxable price upon which the manufacturer's excise tax had been computed. Only in that way could the *price* on which the excise tax had been based be readjusted, and only on the basis of such price readjustment could a proportionate amount of tax refund or credit be determined. A manufacturer's readjustment of a defective article sold, without an actual change in the taxable selling price of the article, obviously cannot comply with statutory requirements."[6]

In the *General Motors* case, the Government's argument was no less explicit:

> "The Council argues that a manufacturer's price is readjusted, by means of an allowance, whenever the manufacturer, after the sale is completed, returns to the purchaser '(a) cash, (b) credit, (c) articles of value, or (d) services of value.' The Government would certainly take no issue with (a) and (b), since clearly both would result in a change in the purchase price on which the excise tax had been computed."[7]

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[6] *Motion of the Defendant for Judgment on the Pleadings and Brief in Support Thereof*, p. 13, Ford Motor Company v. United States, (U. S. Court of Claims, No. 231-56), *supra* note 3.

[7] *Government's Reply to Brief of Amicus Curiae*, p. 3, General Motors Corporation, Frigidaire Division v. United States, (U. S. Court of Claims, No. 55-56), *supra* note 2.

Again before the Court of Claims, the Department of Justice very succinctly stated in its brief:

> "If a manufacturer, having delivered a defective article to a purchaser, should actually compromise and reduce the price which the purchaser had paid for the article or contracted to pay, by way of compensating the purchaser for the defect in the equipment purchased by him, such action would clearly constitute a readjustment of the price by way of a bona fide rebate or allowance within the intendment of Section 3443(a)(2) of the Code. The repair or replacement of a defective part of an article sold, in order to provide the purchaser with that for which he had contracted does not appear to involve in any way a readjustment of the price paid for the article."[8]

Having won those cases on the basis of the distinction, it is inconceivable that the present case should be summarily dismissed on the ground that the distinction is unimportant. The Government's present attempt to ignore this fundamental distinction must not divert the Court's attention from the real issue involved in this case.

In arbitrarily and summarily denying relief under Section 3443(a)(2), the Court of Claims has deprived the Petitioner of its property without due process of law. The court has established a conclusive presumption that if a price is readjusted by reason of a rebate or allowance it is not a "price . . . readjusted by reason of . . . a rebate or allowance"[9] under the statute if the

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[8] *Government's Brief in Opposition to Plaintiff's Motion for Summary Judgment*, p. 4, International Telephone and Telegraph Corporation v. United States, U. S. Court of Claims, No. 62-56, unreported.

[9] Internal Revenue Code of 1939, § 3443(a)(2), 53 STAT. 417.

motive is to satisfy the purchaser of a defective article. This holding strips the statutory provision of all meaning and amounts to a judicial veto of unambiguous tax relief provisions enacted by Congress.

There is no dispute that this case involves a vitally important area of the federal tax laws and since there is no normal appellate procedure from Court of Claims' decisions, the exercise of this Court's supervisory powers is essential.

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted as prayed.

Respectfully submitted,

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August 25, 1959

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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 221

PHILCO CORPORATION, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Claims

MOTION FOR LEAVE TO FILE AND PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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June 17, 1960

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 221

PHILCO CORPORATION, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Claims

---

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING

Philco Corporation moves for leave to file the annexed petition for rehearing of the order of this Court denying the petition for writ of certiorari in this case, entered on October 12, 1959, 361 U.S. 825. Rehearing is sought at this time because, as the annexed petition more fully points out, the United States Court of Claims recently held for plaintiff in *General Motors Corp., Frigidaire Div.* v. *United States*, No. 236-56,

May 4, 1960, on a basis which cannot be reconciled with that same court's summary dismissal of this case.

Although this petition for rehearing is lodged after the expiration of time prescribed in Rule 58 of the rules of this Court, the ground upon which it is based arose after such time, and the Court has power, in its discretion, to entertain the petition. *United States* v. *Ohio Power Co.*, 353 U.S. 98; *Clark* v. *Manufacturers Trust Co.*, 337 U.S. 953.

The annexed petition prays only that this Court summarily vacate the order of the Court of Claims in the instant case in order to provide the Court of Claims with an opportunity to reconsider its decision in the instant case in light of its recent and conflicting decision in the *General Motors* case, *supra*. The question presented is of such vital significance to the proper administration of the excise tax laws that it is appropriate for this Court to exercise its discretion to permit the Court of Claims to resolve and clarify the existing doubt and confusion.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 221

PHILCO CORPORATION, *Petitioner*

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UNITED STATES OF AMERICA, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Claims

---

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner, Philco Corporation, prays this Court to grant rehearing of its order of October 12, 1959, denying a writ of certiorari, 361 U.S. 825; to grant the writ of certiorari; to vacate the judgment of the United States Court of Claims; and to remand the case for further consideration in light of that court's recent decision in *General Motors Corp., Frigidaire Div.* v. *United States*, Nos. 236-56, May 4, 1960. (Hereinafter sometimes referred to as "*May 4, General Motors.*")

(A copy of the opinion of the Court of Claims is appended hereto.)

REASONS FOR GRANTING REHEARING, ISSUING THE WRIT, AND REMANDING THE CASE

1. Since this Court denied certiorari in this case, the United States Court of Claims has reversed its position with respect to the question presented, and, without referring to the instant case,[1] has announced a principle which cannot be reconciled with it.[2] On May 4, 1960, in *General Motors Corp., Frigidaire Div.* v. *United States*, No. 236-56,[3] the Court of Claims decided[4] that a rebate of money constituted a price readjustment entitling petitioner to an excise tax refund under Section 3443(a)(2) of the Internal Revenue Code of 1939 (now Section 6416(b)(1) of the INTERNAL REVENUE CODE OF 1954) *regardless of the reason or purpose for the rebate.* Speaking of a price rebate given to reim-

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[1] In the instant case, the Court of Claims summarily granted the Government's motion for judgment on the pleadings, relying on its prior decisions in General Motors Corp., Frigidaire Div. v. United States, 147 F. Supp. 739, 163 F. Supp. 854, *cert. denied*, 358 U.S. 866, and Ford Motor Co. v. United States, 156 F. Supp. 554, *cert. denied*, 358 U.S. 864. The opinion of the Court of Claims in the May 4 General Motors case made no reference to these or any previous price readjustment cases despite their citation in the dissent.

[2] Petitioner's opposition to the motion for judgment on the pleadings in the instant case briefed the Court of Claims on the legislative history of the controlling statute which, in our opinion, demonstrates that the principle now adopted by the Court of Claims properly reflects the intent of the Congress. See Petition for Certiorari in the instant case, App. B.

[3] The Government's motion for a rehearing of this case is currently pending before the Court of Claims.

[4] By a 3-2 vote, retired Judge Littleton voting with the majority.

burse a vendee for the cost of local advertising, the Court of Claims said:

> "[T]he price was later 'readjusted' by way of a rebate to the purchaser. Section 3443 does not say that is applicable only to some kinds of rebates, or only to rebates given for some kinds of reasons or purposes. . . .
>
> * * * * * *
>
> "[T]he only requirement of [Section 3443] is that some of the money which the purchaser had paid for the property should be later refunded to the purchaser." [App., pp. 3a, 5a].

This statement, which we believe correctly reflects the unambiguous intent of the Congress,[5] cannot be reconciled with the action of the Court of Claims in the instant case.[6] Here, the Court of Claims dismissed without evidentiary hearing Philco's petition alleging that petitioner had made a rebate of money to its vendee because a purchased article had proved defective. The only possible distinction between the instant case and the *May 4 General Motors* case is the reason or purpose for giving the rebate, and in the *May 4 General Motors* case the Court of Claims belatedly recognized that this distinction is meaningless.

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[5] See n. 2 *supra*.

[6] For several years the Court of Claims has been struggling with the problem of what constitutes a price readjustment under Section 3443 of the Internal Revenue Code of 1939. This struggle, unhappily, has not been marked by the common judicial definitional process of inclusion and exclusion, but rather by a reversal and re-reversal of principle. Compare the May 4 General Motors case with the cases cited n. 1 *supra*. Compare also General Motors Corp., Frigidaire Div. v. United States, 121 F. Supp. 932, *cert. denied*, 348 U.S. 942.

The complete silence of the *May 4 General Motors* case with respect to all earlier Court of Claims price readjustment cases leaves unresolved that court's obvious inconsistency on this vitally important question affecting a large area of excise tax law. We now urge only that the Court of Claims be afforded the opportunity,[7] without indication of this Court's views on the merits, to reconsider its decision in the instant case in light of its recent decision in the *May 4 General Motors* case and, in its discretion, to reconcile or clarify the existing confusion.

2. Some clear answer to the question here presented is essential for all manufacturers who must formulate price policies for the numerous articles subject to excise taxes. As of this date there are no less than seven excise tax price readjustment cases pending in four different Federal courts, all of which could turn on the question of whether or not the reason or purpose for making a rebate has tax consequences.[8]

---

[7] Absent action by this Court on this petition, the petitioner will have no remedy before the Court of Claims. Ct. Cl. Rule 54(b); Scotten v. Littlefield, 235 U.S. 407; Collins v. Wichita, 254 F. 2d 837 (10th Cir.); Berryhill v. United States, 199 F. 2d 217 (6th Cir.); Loucke v. United States, 21 F.R.D. 305 (S.D.N.Y.); 7 Moore, Federal Practice § 60.26[3] at 282.

[8] Chrysler Corp. v. United States, Civil No. 19,418, E.D. Mich., complaint filed Sept. 18, 1959; Philco Corp. v. United States, Civil No. 28,000, E.D. Pa., complaint filed Apr. 29, 1960; U. S. Associates, Inc. v. United States, Civil No. 1277-59 HW, S.D. Calif., complaint filed Dec. 10, 1959; Ben-Hur Mfr. Co. v. United States, No. 464-56, Ct. Cl., petition filed Oct. 30, 1956; Columbia Broadcasting System v. United States, No. 423-57, Ct. Cl., petition filed Aug. 30, 1957; Ford Motor Co. v. United States, No. 415-56, Ct. Cl., petition filed Sept. 28, 1956; Kaiser Industries, Inc. v. United States, No. 536-56, Ct. Cl., petition filed Dec. 27, 1956. Cf. Waste King Corp. v. United States, Fed. Excise Tax Rep. (60-1 USTC) ¶ 15,271 (Nov. 25, 1959).

In a petition for certiorari,[9] the Government indicated the importance of the question here presented and estimated that its resolution would affect taxes amounting to roughly 27 million dollars per year. Perhaps even more significant than the total amount involved is the fact that the excise tax, being measured by price, is a tax upon gross revenues, a tax which exceeds the profit margin on some articles. If doubt and confusion unnecessarily continue to becloud tax consequences of rebates, manufacturers will be forced to resolve the doubt by charging higher prices or else by making themselves vulnerable to a loss on each sale involved.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that rehearing be granted, and that, upon such rehearing, a writ of certiorari issue, the judgment of the United States Court of Claims be vacated, and the case be remanded for further consideration in light of the Court of Claims decision in *General Motors Corp., Frigidaire Div.* v. *United States*, No. 236-56, May 4, 1960.

Respectfully submitted,

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[9] United States v. General Motors Corp., Frigidaire Div., *cert. denied*, 348 U.S. 942.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

HENRY B. WEAVER, JR.

APPENDIX

IN THE UNITED STATES COURT OF CLAIMS

No. 236-56

(Decided May 4, 1960)

GENERAL MOTORS CORPORATION, FRIGIDAIRE DIVISION

v.

THE UNITED STATES

Mr. Newell W. Ellison for plaintiff. *Messrs. Henry M. Hogan, Calvert Thomas, J. C. Siegesmund, Jr., Daniel M. Gribbon*, and *John B. Jones, Jr.*, were on the briefs.

Mr. Harold S. Larsen, with whom was *Mr. Assistant Attorney General Charles K. Rice*, for the defendant. *Messrs. James P. Garland* and *Philip R. Miller* were on the brief.

OPINION

MADDEN, *Judge*, delivered the opinion of the court:

Plaintiff sues for refund of excise taxes exacted on the price for which it sold refrigerators to its distributors. It says it is entitled to deduct, as an allowance, the amount it refunded to the distributors, for transmittal to the retailers, on account of the cost of advertising the product in the localities of the various retailers. It relies on the provisions of section 3442 of the Internal Revenue Code of 1939, which reads:

SEC. 3442. *Credits and Refunds.*

(a) A credit against tax under this chapter, or a refund, may be allowed or made—

(2) to any person who has paid tax under this chapter with respect to an article, when the price on which the tax was based is readjusted by reason of return or repossession of the article or a covering or container, or by a bona fide discount, rebate, or allowance; in the amount of that part of the tax proportionate to the part of the price which is refunded or credited.

[26 U.S.C. § 3443; 53 Stat. 417 (1939)].

Under this statute, if a manufacturer sells an item at a stated price, but allows the purchaser a discount, before payment, or a refund or credit of a part of the price, after payment, the amount of the discount or refund or credit is deducted from the originally stated price, and a proportionate refund of the tax is given to the manufacturer. The plaintiff's situation seems to fit the text of the statute. The Government, nevertheless, urges that for many reasons the statute does not apply.

The plaintiff collected from its vendees a stated price for its refrigerators and other products subject to the manufacturer's excise tax, as well as for its products not subject to the tax. It had a "cooperative advertising plan" under which most but not all of its products, including all of its products which were subject to the excise tax, were covered. The plan was that the plaintiff agreed, if a retailer of its products would spend money in advertising locally the plaintiff's products and their availability at the retailer's store, and if his advertising complied with certain standards set by the plaintiff, the plaintiff would pay to the dealer one-half of the cost of the advertising, but not to exceed $1\frac{1}{4}$ percent of the plaintiff's "suggested cash installed price." During the period covered by the instant suit, advertisements using the following media were permissible under the plan: newspapers, radio, television, movie trailers, telephone directories, display materials, exhibits and shows, car cards, tabloids, advertising novelties, circulars, direct mail, and signs.

The plan does not obligate a dealer to do any advertising, nor, if he does advertise, to comply with the standards set by the plan. If he does not advertise, or if his advertisements do not comply with the standards, he does not get any payment from the plaintiff. If he is entitled to a payment, he is obliged to submit proof of his claim within the current calendar year or within five months after the end of the year.

The effect of the plan was that if a dealer had, for example, bought refrigerators from the plaintiff, or one of its distributors, and paid $5,000 for them and had spent money in local advertising of the refrigerators, the plaintiff would pay him 1¼ percent of the suggested installed price of the refrigerators, which we will assume to have been $7,500, if he had spent twice or more the amount of the 1¼ percent. In the example just given the retailer would get back $93.75. The net payment of the dealer to the plaintiff would be, then, not $5,000, but $93.75 less than $5,000. The plaintiff says that, under section 3443, it should get back the excise tax which it paid on the $93.75.

We think the plaintiff is right. Its sale of the refrigerators was for $5,000 and it paid the sales tax on that sum, but the price was later "readjusted" by way of a rebate to the purchaser. Section 3443 does not say that it is applicable only to some kinds of rebates, or only to rebates given for some kinds of reasons or purposes. It is, of course, conceivable that there might be situations in which a repayment or credit is given by the manufacturer to the purchaser, but to which section 3443 should not apply because its application would violate the statutory purpose, or would create such difficulties in the administration of the tax laws as to compel a departure from the letter of the statute.

Discounts and rebates are given for various reasons but always, we suppose, because the giving of them will be of

benefit to the giver. They are, we suppose, always welcomed by the receiver. A discount for prompt payment benefits the giver because it assures him against the loss of the debt, and gives him available working capital. A discount, or a rebate at the end of the year, because of the quantity purchased by the vendee, is good for the seller because it induces the vendee to purchase and dispose of more of the seller's goods. A promised discount on floor stocks in the hands of the vendee at the time of a model change is good for the seller because it reassures the vendee and causes him to maintain adequate stocks even though a model change is anticipated.

The Government urges that the plaintiff is buying advertising for its goods when it induces and partly pays for the retailer's advertising. This is, of course, true, but we think it does not distinguish the instant case from other discount and rebate situations which are admittedly covered by section 3443. In the situations referred to above, the vendor is buying the early use of money and insurance against defaults in payment, or is buying additional effort and expense on the part of the retailer to dispose of a large quantity of goods, or is buying assurance that the retailer will maintain an adequate stock of goods so that opportunities for sales will not be missed.

One type of excise tax case involving advertising expense has been litigated. In *F. W. Fitch Co.* v. *United States*, 323 U.S. 582, the question was whether, under the then-applicable version of section 3441 of the Internal Revenue Code of 1939, the manufacturer's cost of national advertising should be dissected out of and excluded from the sale price on which the excise tax was computed. The statute provided for the exclusion of "A transportation, delivery, insurance, installation or other charge * * *." Fitch claimed that its expenditures for national advertising were "other charges", and hence excluded by section 3441. The Supreme Court rejected the argument. This court, in *Lucy*,

Co. v. *United States*, 93 Ct. Cl. 386, [38 F. Supp. 284], had previously reached the same conclusion.

The *Fitch* case is not in point in the instant litigation. Transportation, delivery, insurance and installation charges are expenses incurred after the manufacture of the goods. They are readily susceptible of separate billing. The words "other charge" in section 3441 meant, the Supreme Court held, other charges of a similar nature, considered in the context of the statute.

In the instant case, the taxpayer's reliance is on section 3443, and the only requirement of the statute is that some of the money which the purchaser had paid for the property should be later refunded to the purchaser. The fact that the occasion for the refund had to do with advertising does not relate the instant problem to the one decided in *Fitch*, and *Iyer*.

In the 1956 Report prepared by the staffs of the Joint Committee on Internal Revenue Taxation, and the Department of the Treasury, and submitted to a subcommittee of the Ways and Means Committee of the House of Representatives, the representatives of the Treasury Department joined in the following statement:

> Based on the foregoing, the present position of the Service with respect to cooperative advertising substantially is as follows:
>
> (1) The distinction between national and local advertising is abolished.
>
> (2) Where a manufacturer's selling price to his customer contains an unsegregated advertising charge, it is a part of his tax base.
>
> (3) In the case where a manufacturer makes a separate charge to his distributor for advertising and the proceeds are kept in a separate account earmarked for advertising, the separate advertising charge is not a part of the tax base. This exclusion of the advertising charge from the tax base can be supported by estab-

lishing that the charge is either listed separately on the sales invoice or billed separately; the contributions from distributors are set aside as a fund to be used for advertising for the benefit of these contributors; and the funds are so used or the unexpended portion is held in trust or refunded to the contributor upon his withdrawal from the program.

(4) Even in the case of a separate fund (as outlined in (3) above), where the manufacturer makes a contribution to the advertising account, then in accord with *Fitch* v. *U.S.*, *supra*, the amount of the manufacturer's contribution may not be deducted in computing the taxable sale price. *However, subsequent allowances from such contributions to distributors for expenditures by them or their dealers in advertising are to be treated as readjustments of sale price under Section 6416(b)(1)*[1] *of the Code.* [Italics added.]

The recognition of the allowances in the situation last described as readjustments of sale price is distinguishable from the issue involving the treatment of expenses incurred in fulfilling warranties on the ground that they constitute direct allowances by the manufacturer to his customer as a part of the sales program in which the manufacturer is involved. These adjustments are, as indicated before, made to the manufacturer's vendee and are not dependent upon conditions which may subsequently occur with respect to the article in the hands of the ultimate consumer many steps removed from the transaction upon which the imposition of tax occurred.[2]

The Treasury's authorized spokesman read to the subcommittee a prepared statement which contained the following paragraph:

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[1] This section of Internal Revenue Code of 1954 is substantially identical with section 3443 of the 1939 Code.

[2] Hearings on Excise Tax Technical and Administrative Problems before a subcommittee of the House Committee on Ways and Means, 84th Cong., 2d sess., Part 2, pp. 13-15 (January 10, 1956).

(3) Where the manufacturer makes a contribution to the advertising account in the case of a separate fund, the amount of the manufacturer's contribution may not be deducted in computing the taxable sale price. Subsequent allowances from such contributions to distributors for expenditures by them on their dealers in advertising should be treated as readjustments of sale price under section 6416(b)(1) of the Code.

The spokesman interrupted his reading to advise the subcommittee that "The Internal Revenue Service will rule in the manner indicated" and that "the problem can best be handled by ruling and does not require legislation."[3]

The foregoing quoted statements represented the interpretation which the Internal Revenue Service placed upon the statute in January 1956. On December 19, 1956, the Commissioner of Internal Revenue wrote to the chairman of the subcommittee explaining why the Revenue ruling promised in January had not been issued. He said that because of intervening events, principally the filing by taxpayers of several suits involving large sums,

> • • • We do not feel that we are in a position to go forward with the publication of the ruling we previously discussed nor, until further facts are developed, to suggest a satisfactory solution to the problem at this time.[4]

On December 16, 1958, T.D. 6340, 23 Fed. Reg. 9692-3, promulgated Treasury Regulations sections 330.1-1 to 330.1-3 bearing on the question of advertising expenses and rebates and allowances. Section 330.1-3 expressly provides that these regulations are not retroactive, hence we do not consider or discuss them.

[3] Id. pp. 57-59.

[4] Hearings on Excise Tax Technical and Administrative Problems before a subcommittee of the House Committee on Ways and Means, *supra*, Part 3, pp. 922-923.

We think that the interpretation which the Treasury Department gave to section 3443 in January 1956, was right. We find no justification for departing from the language of the statute.

The plaintiff is entitled to recover and judgment will be entered to that effect. The amount of recovery will be determined pursuant to Rule 38(c).

It is so ordered.

LITTLETON, *Judge* (*Ret.*), and LARAMORE, *Judge*, concur.

WHITAKER, *Judge*, dissenting:

I am unable to agree with the majority. The retailer paid the purchase price not for a refrigerator alone, but for one that had already been advertised nationally and which the seller agreed to assist in advertising locally. Hence, when the seller remitted to the advertising medium or to the retailer his agreed contribution to the cost of local advertising, he was doing nothing more than fulfilling the obligation for which the purchase price was paid. He was paying for something he had agreed to deliver as part consideration for the purchase price.

A refrigerator on his floor was worth but little to the dealer unless his customers knew he had it. What he paid for was the refrigerator itself and the manufacturer's assistance in letting people know he had it in stock. A refrigerator unadvertised locally, was worth something to the dealer, but advertised locally it was worth considerably more. This added value gained through local advertising, paid for in part by the manufacturer, was what the dealer purchased. The advertising of the article was an integral part of what the dealer bought, quite as much so the frame, the doors, and the freezing unit. The advertising gave to the article the element of desirability, just as did the paint and the chrome on it. The advertising, both national and local, cooperated with the paint and the chrome to make

people want it. Since it was bought for resale, this was its most valuable element to the dealer.

The obligation of the manufacturer to assist in advertising it locally was a part of the consideration for which the sales price was paid and, hence, the discharge of this obligation by payment of the agreed amount could not be an "allowance" to the dealer. An "allowance", as used in the Act, must work a "readjustment" or reduction in the sales price. There has been no reduction in the sales price. The manufacturer still has the amount paid it when the sale was made and has delivered no more than it agreed to deliver, to wit, a refrigerator and a part of the cost of putting the refrigerator on display locally. A refrigerator on display was what the dealer wanted, not one hidden in its basement. This is what it paid for and this is what the manufacturer gave him.

Section 3441(a) provided that in determining the sales price there should be excluded "a transportation, delivery, insurance, installation or other charge (not required by the foregoing sentence to be included)." Manufacturers insisted that the cost of national advertising was a "charge" to be excluded from the manufacturer's sales price, but this court held to the contrary in *Acer Co. v. United States*, 93 Ct. Cl. 386, [38 F. Supp. 284]. The Court of Appeals of the 8th Circuit was of like opinion, but the 7th Circuit had held otherwise in *Compana Corp. v. Harrison*, 114 F. 2d 400. The Supreme Court settled the controversy in *Fitch Co. v. United States*, 323 U.S. 582. It held in that case that what the manufacturer sold was a nationally advertised product and that the advertising was an integral part of the product sold and could not be separated from it, whether or not charged for separately, and, hence, that there was no basis for excluding the cost of it from the sales price. I see no distinction between a manufacturer's national advertising and its advertising done through the instrumentality of its dealers scattered throughout the country from the Atlantic to the

Pacific, and from the Great Lakes to the Gulf. When this advertising through dealers is taken as a whole, as it must be, it is indeed national advertising by the manufacturer of its product. The manufacturer knows this local advertising will enhance the value of its product, as well as benefit the dealer and, hence, it is willing to share the cost. Indeed, plaintiff calls it its "cooperative advertising plan." This is to say that the retailer and the manufacturer "go in together" to do something for their mutual benefit, to advertise that the manufacturer's product is obtainable at the store of the dealer, and that it is a superior product. This helps the retailer sell the product, and the manufacturer to sell other products.

I reiterate: What the manufacturer sells is not an unknown product, but one nationally advertised and one which he obligates himself to assist in advertising locally up to a stated amount. In each case, the manufacturer incurs an additional cost to enhance the value of the product. In each case, the purchaser must pay this additional cost in order to obtain the product. An advertised product is what is sold, whether advertised nationally or locally. Hence, the cost of neither is to be excluded from the sales price.

Before the manufacturer ever sells the refrigerator it sets up on its books an account to take care of the cost of local advertising. The amount charged to the account is 1¼ percent of the "suggested cash installed price." This, of course, is taken into account by the manufacturer in fixing his sales price. When it pays this cost, it is discharging an obligation it assumed when it demanded the sales price. The sales price is no more to be readjusted on that account than for the cost of advertising in a national magazine or the cost of the frame, or the doors, or the freezing unit. They are all an integral part of the thing sold.

This is contrary to the view of the District Court for the Southern District of Indiana in *Sorrel* v. *Smith*, 54 F. Supp.

436. Local advertising was involved in this case, but the opinion did not distinguish between local and national advertising. Judge Evans, acting as District Judge, expressly refused to follow our decision in *Ager Co.* v. *United States*, *supra*, where national advertising was involved, but did follow *Compana Corp.* v. *Harrison*, 114 F. 2d 400, and the District Court's opinion in *Fitch Co.* v. *United States*, *supra*, which also involved national advertising. However, the Court of Appeals reversed the District Court in *Fitch Co.* v. *United States*, and the Supreme Court affirmed the Court of Appeals. *Servel* v. *Smith*, and *Compana Corp.* v. *Harrison* have, therefore, been overruled.

What I have said is in harmony with the principle underlying the decision in *Ford Motor Co.* v. *United States*, 140 Ct. Cl. 487, [156 F. Supp. 554]. In that case the manufacturer sold its product with an expressed 90-day warranty. No one could purchase the product without this warranty. The manufacturer attempted to claim a tax refund by reason of its reimbursement of its dealers for the expense they incurred in fulfilling the manufacturer's warranty agreement. This court held that these payments were not a reduction in the sales price, but rather were the fulfillment of the manufacturer's part of the bargain, to wit, a machine in which no defects would appear in 90 days. When this promise was fulfilled, the purchaser merely received what it had paid for in the first instance. When a manufacturer pays an expense which it has promised to pay at the time of the original sale, it can never be a reduction in the sales price. Its payment is, in fact, a part of the consideration for the sales price. Cf. *General Motors Corp.* v. *United States*, 142 Ct. Cl. 842. [163 F. Supp. 854].

I am authorized to say that JONES, *Chief Judge*, joins in this dissenting opinion.